

Fair Labor Standards Act Decision
Under section 204(f) of title 29, United States Code

Claimant: [claimant's name]

Agency classification: Exercise Specialist
GS-301-12

Organization: Civil Support Training Group [region]
Civil Support Training Center
Headquarters
United States Army North Headquarters
United States Army Forces Command
Department of the Army
[city and state]

Claim: Exemption status

OPM decision: Exempt

OPM decision number: F-0301-12-01

/s/ Robert D. Hendler

Robert D. Hendler
Classification and Pay Claims
Program Manager

9/20/07

Date

As provided in section 551.708 of title 5, Code of Federal Regulations (CFR), this is binding on all administrative, certifying, payroll, disbursing, and accounting officials of agencies for which the U.S. Office of Personnel Management administers the Fair Labor Standards Act. The agency should identify all similarly situated current and, to the extent possible, former employees, and ensure that they are treated in a manner consistent with this decision. There is no right of further administrative appeal. This decision is subject to discretionary review only under conditions and time limits specified in 5 CFR 551.708 (address provided in section 551.710). The claimant has the right to bring action in the appropriate Federal court if dissatisfied with the decision.

Decision sent to:

[claimant's name and address]

Office of the Assistant Secretary (Manpower and Reserve Affairs)
Deputy Assistant Secretary of the Army (Human Resources)
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The Pentagon, Room 2E468
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Office of the Deputy Chief of Staff, G-1
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Introduction

On November 15, 2006, the U.S. Office of Personnel Management (OPM) received a Fair Labor Standards Act (FLSA) claim from [claimant's name]. He believes the FLSA exemption status of his position should be nonexempt and that he is owed payment for the period from January 10, 2005, to present. The claimant's position is currently classified as an Exercise Specialist, GS-301-12, and is located in Civil Support Training Group [region], Civil Support Training Center Headquarters, United States Army North (ARNORTH) Headquarters, United States Army Forces Command, Department of the Army, at [city and state]. We have accepted and decided this claim under section 4(f) of the FLSA as amended.

In reaching our FLSA decision, we have carefully considered all information furnished by the claimant and his agency, including the agency administrative report (AAR) which we received on April 2, 2007, and the claimant's comments on the AAR which we received on May 8, 2007. To help decide this claim, we conducted a telephone interview with the claimant on June 29, 2007. We also conducted a joint telephone interview with the immediate supervisor and, at his request, ARNORTH's Civilian Personnel Advisor on June 19, 2007.

Background and general issues

The claimant's initial request raised a myriad of issues in addition to his position's FLSA exemption status and entitlement under the FLSA overtime pay provisions. For instance, he believes he is due pay under premium pay provisions authorized by chapter 55 of title 5, United States Code (U.S.C.) such as night differential, administratively uncontrollable overtime, and availability pay. Our decision addresses strictly the FLSA issues and will not discuss further those 5 U.S.C. chapter 55 premium pay provisions that are settled through OPM's compensation and leave claims process. The claimant was informed of this during the course of our adjudication of this claim.

The agency and claimant provided OPM with the official position descriptions (PD) to which the claimant was assigned since January 10, 2005, the effective date of his initial appointment to a GS-301-11 position, PD number [number]. On January 8, 2006, the claimant was promoted to the GS-12 grade level based on additional duties and responsibilities and assigned to PD number [number]. When responsibility for the claimant's organization transferred from the Fifth United States Army to ARNORTH, the claimant accepted a position from the transfer of function in January 2006. On February 19, 2006, he was officially reassigned to a GS-301-12 PD, number [number], describing duties identical to those performed under the prior PD but adding the requirement to deploy as a condition of employment.

FLSA claims are subject to a two-year statute of limitations, except in cases of a willful violation where the statute of limitations is three years (section 551.702(b) of title 5, Code of Federal Regulations (CFR)). A claimant must submit a written claim to either the employing agency or to OPM in order to preserve the claim period. The date the agency or OPM receives the claim is the date that determines the period of possible back-pay entitlement. The claimant's request was received by OPM on November 15, 2006, and this date is appropriate for preserving the claim period.

Job information

The claimant's position is assigned to one of six teams responsible for training and evaluating National Guard Civil Support Teams (CST) in responding to Weapons of Mass Destruction (WMD) events and testing disaster sites for deadly chemical, biological, radiological, nuclear, or explosive (CBRNE) agents. Although State-controlled, CSTs are Federally-resourced, trained, and evaluated. The CST is supervised by a CST Commander.

The claimant's team is responsible for developing and executing training exercises for six CSTs within their geographic area of responsibility, primarily including [states listed] and for other locations as requested. The team, in addition to the claimant's position, consists of a team chief, operations analyst, senior survey analyst, two survey analysts, medical analyst, and administration and decontamination analyst. As the exercise specialist, the claimant is responsible for developing realistic exercise scenarios addressing the objectives identified by the CST Commander in their Mission Training Plan (MTP). He creates a scenario concept, which is a sequential, narrative account of a hypothetical accident, to address MTP objectives and posts it to the shared drive. Each team member is responsible for building his/her "annex" by providing information specific to his/her subject matter area. For instance, the medical analyst may describe the symptoms associated with CBRNE agents in play. Scenarios are modified during this phase to ensure consistency between functional areas.

Responsibility for surveying training sites is rotated among team members. The claimant is occasionally required to visit, diagram, and take pictures of training sites located oftentimes in State parks or hotels. He determines the location's suitability as a training site based on factors including, but not limited to, size, water availability, restroom facilities, and likely interference from the public. Representatives from local, State, or Federal agencies may be present at site visits if they are facilitating or playing roles in the exercises.

CST training normally consists of executing two exercise lanes in a five-day timeframe. The claimant sets up the scenario's training aids and props on the first day. Team members walk through the exercise site to ensure each understands the expected sequence of events. Actual exercises with the CST run the second day; the claimant monitors the functional areas to ensure their objectives are being met and occasionally plays a role as an incident response member. The second exercise occurs on the third and fourth days and generally follows the same pattern as previously described. Team members evaluate the CST's performance in their functional area with the Commander on the final day. The claimant is not responsible for a functional area, but he will interject his observations from the exercise.

The claimant's PD and other material of record furnish much more information about his duties and responsibilities and how they are performed. The claimant does not believe his current PD is accurate since it does not describe the duties he performs on-site when conducting an actual exercise lane. OPM does not resolve differences as to the accuracy of the PD of record as part of the FLSA claims process. We, however, reviewed the PD as is customary with our analysis of an FLSA claim and found it contains the major duties and responsibilities assigned by management and performed by the claimant. We agree the PD does not spell out the specific on-site duties performed by the claimant but it references this responsibility. For example, the PD

states, “Ensures the CST Commander’s objectives are accomplished in executing WMD/CBRNE exercises that incorporate all designated WMD CST Mission Training Plan (MTP) tasks.” Later in the PD’s evaluation of the position’s work environment, it states, “Work is usually performed both in an office setting and in the field. There will be frequent occasions to visit exercise training sites/field sites and participate in training and evaluations.”

Evaluation

To determine whether the claimant is owed overtime under the Act, the normal process is to first determine whether the work performed is exempt or nonexempt from FLSA provisions. According to 5 CFR 551.201 and 5 CFR 551.202, an agency may designate an employee FLSA exempt only when the agency correctly determines the employee meets one or more of the exemption criteria. In all exemption determinations, the agency must observe the following principles: each employee is presumed to be FLSA nonexempt, exemption criteria must be narrowly construed to apply only to those employees who are clearly within the terms and spirit of the exemption, the burden of proof rests with the agency that asserts the exemption, and the employee should be designated FLSA nonexempt if there is a reasonable doubt as to whether an employee meets the criteria for exemption. There are three exemption categories applied to Federal employees: executive, administrative, and professional.

In their April 2, 2007, response to OPM’s request for information, the Army’s [region] Civilian Personnel Operations Center rationale as to the FLSA exemption status of the position stated:

The major duties reflect that the employee performs office or other predominantly non-manual work which is intellectual and varied in nature. The work significantly affects the formulation or execution of management policies or programs. The employee frequently exercises discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.

The agency concluded the claimant’s position meets the administrative exemption criteria with which the claimant disagrees. Neither the agency nor the claimant addressed the executive or professional exemption criteria and, based on careful review of the record, we find neither is applicable to the appellant’s work. Our comparison of the claimant’s duties and responsibilities to the administrative exemption criteria follows.

Administrative Exemption Criteria

Under the administrative exemption criteria contained in 5 CFR 551.206, an administrative employee is an advisor, assistant, or representative of management, or a specialist in a management or general business function or supporting service who meets all four of the following criteria:

- (a) The employee’s primary duty consists of work that:
 - 1) Significantly affects the formulation or execution of management policies or programs; or

- 2) Involves general management or business functions or supporting services of substantial importance to the organization serviced; or
 - 3) Involves substantial participation in the executive or administrative functions of a management official.
- (b) The employee performs office or other predominantly nonmanual work which is:
- 1) Intellectual and varied in nature; or
 - 2) Of a specialized or technical nature that requires considerable special training, experience, and knowledge.
- (c) The employee must frequently exercise discretion and independent judgment, under only general supervision, in performing the normal day-to-day work.
- (d) In addition to the primary duty criterion that applies to all employees, General Schedule employees classified at GS-5 or GS-6 (or the equivalent in other white collar systems) must spend 80 percent or more of the worktime in a representative workweek on administrative functions and work that is an essential part of those functions.

The claimant's work does not meet (a)(1).

OPM defines the formulation or execution of management programs and policies as work involving management programs and policies which range from broad national goals expressed in statutes or Executive Orders to specific objectives of a small field office. Employees make policy decisions or participate indirectly, through developing proposals that are acted on by others. Employees significantly affect the execution of management policies or programs typically when the work involves obtaining compliance with such policies by individuals or organizations, inside or outside the Federal Government, or making significant determinations in furthering the operation of programs and accomplishing program objectives. Administrative employees engaged in such work typically perform one or more phases of program management (i.e., planning, developing, promotion, coordinating, controlling, or evaluating operating programs). The claimant's position does not operate in this manner.

The claimant's work meets (a)(2).

Work that involves general management, business, or supporting services includes a wide variety of specialists who provide support to line managers by providing expert advice in specialized fields, such as that provided by management consultants or systems analysts; by assuming facets of the overall management function, such as personnel management or financial management; by representing management in business functions, such as negotiating contracts; or by providing support services, such as procurement and distribution of supplies.

The claimant estimates traveling 50 percent of his work time in reviewing proposed training sites or conducting exercise lanes. His on-site work includes tasks commonly considered nonexempt

work like setting up, breaking down, and shipping back training aids and props. While exercises are running, the claimant ensures the scenario stays within set parameters, observes CST participant activities, occasionally plays an incident response member role, and assists other team members as required. Nonetheless, performing physically demanding work would not necessarily make a position covered by FLSA provisions as physically strenuous work is inherent in oftentimes exempt positions like scientists and researchers conducting field work; engineers monitoring, directing, and participating in onsite operations at laboratories, industrial sites, and oil and gas exploration sites; and medical professionals walking, standing, and bending for long periods of time, and those, such as surgeons, who apply exacting manual dexterity to accomplish their professional duties. Regardless, the duties involving manual labor are not the claimant's primary duties. As stated in 5 CFR 551.104:

Primary duty typically means the duty that constitutes the major part (over 50 percent) of an employee's work. A duty constituting less than 50 percent of the work may be credited as the primary duty for exemption purposes provided that duty constitutes a substantial regular part of a position; governs the classification and qualification requirements of the position; and is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment, and the significance of the decisions made.

The record shows the exercise development work occupies 50 percent of the work time; meets the primary duty criteria described above; and, therefore, constitutes the claimant's primary duty rather than the incidental, nonexempt on-site work performed as an extension of and integral to the exercise development work.

The Civil Support Training Group [region] provides training to the CSTs in their geographic region. The claimant is responsible for creating scenarios, which provide a catalyst for exercises and are intended to introduce situations encouraging responses that allow for testing of MTP objectives. Realistic exercises provide the best opportunity for CSTs to evaluate their overall preparedness to operate under emergency conditions. The claimant's work involves a support function as his training organization's existence supports the CST's business function, which involves augmenting local and regional terrorism response capabilities in events known or suspected to involve WMDs. They deploy to assess the CBRNE event, advise the civilian responders regarding appropriate responses, and act as liaison to State and Federal emergency responders. In this way, training is very similar to typical support functions like human resources or finance. As a support function, the success of the claimant's Group is ultimately measured by how well they are meeting the needs of the CSTs in responding to emergency situations. The Group does not generate any direct "business" impact of its own, and their work is made relevant in the way it supports the CST initiative. For example, the claimant designs exercise scenarios based on the objectives identified by the Commander while taking into consideration the CST participants' strengths and weaknesses. The claimant's team evaluates the CST's performance in relation to MTP objectives during the exercise, which serves as a gauge as to how well the CST will react when deployed to emergency situations. Training, in this sense, is a support function as it assists CST in meeting its mission requirements. Consequently, we conclude the claimant's position meets (a)(2).

The claimant's position does not meet (a)(3).

The criterion describes work involving participation in the functions of a management official, which includes employees (such as secretaries and administrative assistants) who participate in portions of the managerial or administrative functions of a supervisor whose scope of responsibility precludes personally attending to all work aspects. To support exemption, such assistants must have knowledge of the supervisor's policies, plans, and views and must be delegated and exercise substantial authority to act for the supervisor. The claimant's position does not operate in this manner.

The claimant's work meets (b)(1).

Work of an intellectual nature requires general intellectual abilities, such as perceptiveness, analytical reasoning, perspective, and judgment, applied to a variety of subject matter fields, or work involving mental processes which involve substantial judgment based on considering, adapting, and applying principles to numerous variables. The employee cannot rely on standardized procedures or precedents, but must recognize and evaluate the effect of a continual variety of conditions or requirements in selecting, adapting, or innovating techniques and procedures; interpreting findings; and selecting and recommending the best alternative from among a broad range of possible actions.

The claimant's work requires intellectual capabilities, like perceptiveness, analytical reasoning, perspective, and judgment, to continually develop realistic and relevant CST exercise scenarios. Terrorist patterns, motivations, strategies, and tactics are constantly evolving, so the claimant must be cognizant of emerging new trends to develop scenarios preparing CSTs in responding to WMD events and situations involving CBRNE agents. Developing exercise scenarios involves intellectual abilities in order to predict the likely sequence of events. For example, the claimant predicts how adding a casualty or injured person to the scenario will impact participants' actions while ensuring sound safety practices are designed into the exercise to prevent real injuries to the participants and public. CST's standard equipment includes a communications van and mobile analytical laboratory for on-site identification of chemical and biological agents. At their discretion, the State may provide the CST with additional equipment that may be incorporated into exercises to familiarize CSTs on their use. The claimant will research equipment to determine the likely outcome of its coming into contact with CBRNE agents.

The claimant believes his position does not meet (b)(1), because he designs scenarios within an established MTP framework, as well as the standards, guidelines, and regulations issued by the Occupational Safety and Health Administration, Environmental Protection Agency, Centers for Disease Control and Prevention, National Fire Protection Association, etc. The record shows the claimant's position was classified at the GS-11 level and upgraded to the GS-12 level based on the performance of additional duties. In reviewing the GS-11 and GS-12 PDs, we noted the agency supported the upgrade by assigning higher levels to two factors; i.e., Factors 3 (Guidelines) and 6 (Personal Contacts). To credit the claimant's position at Level 3-4, the agency described the position's guidelines as "broad guidance." The GS-12 PD specifically states:

While these guidelines are usually applicable to the duties assigned, when some deviation or interpretation to guidelines is required, the Incumbent will render decisions or interpretation or answer questions on unusual issues to ensure training supports the Commander's and civil authorities objectives. The incumbent is recognized as a technical authority in the development and interpretation of these guidelines.

We conclude the claimant's position does not rely on standardized procedures or precedents. Furthermore, we must reject the claimant's highly restrictive rationale with regard to working within and adhering to Federal regulations, guidelines and standards. To do so would suggest employees who evaluate alternative approaches and formulate strategies to adhere to these regulatory requirements, such as some occupational safety and health specialists and environmental protection specialist at Federal activities, would be performing nonexempt work for similar reasons. Therefore, we find the claimant's work meets (b)(1) criterion.

The claimant's work meets (b)(2).

OPM guidance indicates that work of a specialized or technical nature requiring considerable specialized training, experience, and knowledge means specialized knowledge of a complex subject matter and of the principles, techniques, practices, and procedures associated with that subject matter field. These knowledges characteristically are acquired through considerable on-the-job training and experience in the specialized subject matter field, as distinguished from professional knowledge characteristically acquired through specialized academic education.

The claimant's duties require substantial effort in analyzing and applying subject matter knowledge of considerable difficulty, which formed the basis for classifying the claimant's position to the GS-12 grade level. Section 5104(12) of title 5, United States Code, describes work at the GS-12 grade level as follows:

To perform, under general administrative supervision, with wide latitude for the exercise of independent judgment, work of a very high order of difficulty and responsibility along special technical, supervisory, or administrative lines in office, business, or fiscal administration, requiring extended specialized, supervisory, or administrative training and experience which has demonstrated leadership and attainments of a high order is specialized or administrative work, and intimate grasp of a specialized and complex subject matter or of the profession, art, or science involved.

Accordingly, we find the claimant's position meets (b)(2) criterion. Neither the agency nor the claimant disagrees.

The claimant's work meets (c).

According to established OPM guidance, the exercise of discretion and independent judgment involves interpreting results or implications, and independently taking action or making decisions after considering the various possibilities. The work must involve sufficient variables as to regularly require discretion and judgment.

CST Commanders are responsible for ensuring CSTs are properly trained and certified, so they contact the claimant's organization when training is required. The claimant estimates developing 19 to 24 exercise scenarios annually. He said scenarios are typically new or significantly modified to ensure CSTs are exposed to fresh ideas. Whether scenarios meet end results (i.e., by addressing MTP objectives) depends on numerous judgment calls made by the claimant on issues involving site suitability, CST personnel strengths and weaknesses, available equipment, and participation of other local, State, or Federal officials. For example, the claimant may incorporate new equipment into the scenario, requiring him to conduct research on how best to utilize equipment in the exercise. On occasion, CSTs send the wrong equipment on-site and the claimant has to consider the various possibilities in modifying scenarios to accommodate unexpected equipment.

The claimant uses judgment in determining if an exercise puts the CST's safety at risk. He may forward recommendations to the team chief, suggesting approving a scenario partially addressing MTP objectives while tabling other objectives for another exercise. To meet this factor, it is not necessary for the claimant to make firm commitments or final decisions since his recommendations are usually accepted with only occasional revision. The recommendations made by the claimant are not limited in impact to, e.g., the procedural details of his own work. Instead, his recommendations have significant affect on his team's ability to provide CST training. Since discretion, independent judgment, and creativity are required by the claimant's position, we find the claimant's position fully meets (c).

Criterion (d) is not applicable to the claimant's position.

Conclusion

The claimant's position meets all of the administrative exemption criteria.

Decision

Based on the preceding analysis, the claimant's work meets the administrative exemption criteria and is, therefore, exempt from all FLSA provisions including overtime pay and hours of work that covers time spent on standby duty or in an on-call status.